

APPLICANT:
Parcel 220, LLC

REQUEST: A modification of variance
granted by Board of Appeals Case No. 5204
to permit disturbance of critical area buffer
in a B3 District

HEARING DATE: October 3, 2005

BEFORE THE
ZONING HEARING EXAMINER
FOR HARFORD COUNTY
BOARD OF APPEALS
Case No. 5502

ZONING HEARING EXAMINER'S DECISION

APPLICANT: Parcel 220, LLC

LOCATION: 2210 Pulaski Highway, Edgewood
Tax Map: 65 / Grid: 2F
Parcel: SHA right of way to be combined with Parcel 220
First (1st) Election District

ZONING: B3 / General Business District

REQUEST: A modification of variance granted by Board of Appeals Case No. 5204,
to permit disturbance of critical area buffer in a B3 District, pursuant to
Sections 267-9D and 267-41.1H of the Harford County Code.

TESTIMONY AND EVIDENCE OF RECORD:

For the Applicant first testified David Rudisell, employed by Frederick Ward Associates, Inc. Mr. Rudisell was offered and accepted as an expert in site plan design. Mr. Rudisell described the subject property as being approximately 3.2154 acres in size, which includes a recently acquired State Highway Administration right-of-way of about 0.2654 acres. Mr. Rudisell stated that on August 13, 2002, an earlier variance request concerning the subject property had been granted in Board of Appeals Case No. 5204. Mr. Rudisell explained that variance request was to permit the disturbance of a portion of the subject property which had been designated as a critical area.

A review of the decision in Case No. 5204 reveals that the subject property was described as being subject to a contract of sale by the then Applicant. The Applicant desired to use the property for the commercial sale of used automobiles. The property at that time was undeveloped and was surrounded by other commercial uses. It was heavily impacted by environmental features including an extensive 100 foot buffer caused by the presence of non-tidal wetlands.

Case No. 5502 – Parcel 220, LLC

Testimony and findings, in that case, were that the property is “. . . encumbered by expanded critical area buffer. There is a sewer easement by bisects the parcel and the property is split between IDA and RCA areas. Because of the features found on the property, no use has been able to be developed.” The Hearing Examiner went on to find that the expanded buffer which impacts the site restricts its use, is a unique feature and justified the granting of the variance.

Mr. Rudisell described Applicant’s Exhibit No. 11, which is the site plan of the property. The site plan clearly shows the existence of a 35 foot sewer easement across the north side of the property; a 50 foot flood plain buffer, again across the northern part of the property; and the limits of the Chesapeake Bay Critical Area and Critical Area buffer. It is clear from the site plan that virtually the entire property is encumbered by these natural resource features. The property is further shown as having a land use of “intensely developed area (IDA) and is in a Resource Conservation Area”.

Mr. Rudisell stated that after receiving its original variance the Applicant took title to the property and began to install the planned parking area on the subject property. However, the Applicants have recently been able to obtain from the State Highway Administration an approximately quarter acre parcel which adjoins the subject property to its southeast, and which contains additional frontage along U.S. Route 40. A review of the revised site plan indicates that the new parcel acquired from the State Highway Administration tends to “square off” the lot by filling in an irregular corner which had existed on the southeast side of the property, along U.S. Route 40.

Mr. Rudisell stated that while the original project is being completed and the storm water management facility is being constructed, the Applicant now wishes to modify its plans given the acquisition of this new parcel. The Applicant now proposes to eliminate approximately 3,410 square feet of parking which is now located generally to the north side of the property, and shown as a lightly shaded area on the Applicant’s site plan (Applicant’s Exhibit No. 11). The Applicant proposes to grade and maintain this portion in grass or other vegetation in order to help meet its storm water management requirements. The Applicant will, in turn, pave and use for parking a portion of the property newly acquired from the State Highway Administration. However, the Applicant’s improvement of the newly acquired State Highway Administration parcel will require an impact on approximately 3,422 feet of the Chesapeake Bay Critical Area buffer. The area to be impacted, which will be used by the Applicant’s parking lot, is shown in bold shade on the Applicant’s site plan.

Mr. Rudisell stated that no additional fill will be necessary to be brought on site. As a result, the Applicant is electing not to pave approximately 3,400 feet which is now has permission to do, and seeks permission to pave approximately the same amount on the newly acquired State Highway Administration.

Case No. 5502 – Parcel 220, LLC

Mr. Rudisell stated that the original wetlands on the site were created by run-off from U.S. Route 40. Mr. Rudisell does not believe that the proposed variance, which is in essence the relocation of approximately 3,400 square feet of impervious surface in the Critical Area buffer, would have any adverse impact. Mr. Rudisell explained that the Maryland Department of the Environment, by letter dated September 12, 2005 and offered as Applicant's Exhibit No. 15, has expressed no objection to the granting of this variance and the realignment of the parking lot.

Mr. Rudisell further explained that the two parcels, being the original 2.95 acres and the recently acquired State Highway right-of-way of 0.2654 acres, will be combined by deed into one parcel.

Next for the Harford County Department of Planning and Zoning testified Dennis Sigler. Mr. Sigler expressed the Department's opinion that the relocation of this portion of the parking area is an improvement over the existing plan. This portion of the relocated parking area will be further away from the 100 year flood plain and associated buffers.

The Department's Staff Report indicates as follows:

"The amount of area impacted is the same. Most of the extended parking area is outside of the buffer area and does not need Board of Appeals approval. The newly acquired land will be combined by deed to the overall site. The proposed plan will shift the development of the site closer to Route 40 and away from the wetlands to the rear." (See page 5)

Mr. Sigler and the Department concluded that all applicable provisions had been complied with. The Chesapeake Bay Critical Area Commission does not object to the request. Accordingly, the Department recommends approval, with conditions.

There was no evidence or testimony presented in opposition.

APPLICABLE LAW:

Section 267-41.1H of the Harford County Code states:

*"H. Variances. Variances from the provisions of this *section may only be granted if, due to special features of a site or other circumstances, implementation of this section or a literal enforcement of its provisions would result in unwarranted hardship to an applicant. All applications for variances shall be reviewed by the Zoning Administrator for conformance with applicable provisions of this section, and a written report shall be provided to the Board of Appeals. In granting a variance, the Board shall issue written findings demonstrating that the requested approval complies with each of the following conditions:*

Case No. 5502 – Parcel 220, LLC

- (1) *That special conditions or circumstances exist that are peculiar to the land or structure within the County's critical area, and a literal enforcement of the critical area program would result in an unwarranted hardship. [Added by Bill 01-35]*
- (2) *That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.*
- (3) *That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.*
- (4) *That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.*
- (5) *That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.*
- (6) *That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.*
- (7) *That the growth allocation for the county will not be exceeded by the granting of the variance.*
- (8) *That the variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part I or the public interest.*

Case No. 5502 – Parcel 220, LLC

- (9) *All applications for variance requests shall be filed in writing in accordance with Section 267-9D of the Zoning Code. Notice of all variance requests and copies of applications filed in accordance with this section shall be sent to the Chesapeake Bay Critical Area Commission within 10 working days of filing with the Department of Planning and Zoning. A copy of the recommendation of the hearing examiner or of the Board in acting on the variance shall be promptly sent to the Commission."*

*Chesapeake Bay Critical Area Overlay District

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Applicant's property, combined with the newly acquired parcel, consists of approximately 3.2 acres located on the north side of Pulaski Highway approximately 300' east of Edgewood Road. The property is located within the Commercial Revitalization District of U.S. Route 40, with the predominant land use in that area being commercial. According to the Staff Report uses include shopping centers, individual retail, restaurants, professional offices, service uses, auto dealerships, warehousing and general merchandise stores.

The property is very heavily impacted by the Chesapeake Bay Critical Areas and associated buffers, as well as a 35 foot wide sewer easement to the rear of the property. There was testimony that much of the wetlands on site were caused by run-off from U.S. Route 40.

It is clear that the property is heavily impacted by wetlands and associated buffers. In Case No. 5204, with Decision dated September 11, 2002, the Harford County Hearing Examiner recommended approval of a variance request which will allow the Applicant to construct a used car auto dealership and related facilities on the subject property. The Hearing Examiner found, among other things that the property was unique, being "entirely" encumbered by expanded Critical Area buffer. The Hearing Examiner found that the denial of the Applicants requested use would constitute an unwarranted hardship. The Hearing Examiner noted in his recommended opinion that there was no opposition to the request.

The Hearing Examiner went on to address, favorably, the critical area variance requirements contained in Code Section 267-41.1H, and recommended approval subject to seven conditions.

Case No. 5502 – Parcel 220, LLC

The Applicants now have an opportunity to acquire an additional quarter acre parcel from the State Highway Administration, which has declared that parcel to be surplus. Acquisition of this parcel will tend to “square off” the Applicants property, and will give it additional frontage on U.S. Route 40. The Applicant intends to improve the newly acquired parcel by including it within its paved parking area. To do so the Applicant requests a variance to disturb approximately 3,400 feet of Critical Area buffer. In return the Applicant will be giving up its right, which was obtained in the 2002 variance approval, to pave and use approximately the same amount of area located somewhat to the rear of the newly acquired property.

The Applicant has framed its application as a request for a “modification” of the 2002 decision. However, it would appear that the applicable variance standard contained at Section 267-41.1H provides no clear method to “modify” an earlier approved variance. Accordingly, this request for modification will be treated as a request for variance which will require a review in light of all factors of Section 267-41.1H of the Harford County Code, as follows:

“H. Variances. Variances from the provisions of this section may only be granted if, due to special features of a site or other circumstances, implementation of this section or a literal enforcement of its provisions would result in unwarranted hardship to an applicant. All applications for variances shall be reviewed by the Zoning Administrator for conformance with applicable provisions of this section, and a written report shall be provided to the Board of Appeals. In granting a variance, the Board shall issue written findings demonstrating that the requested approval complies with each of the following conditions:

The standard, accordingly, is whether the literal enforcement provisions of this section will result in “unwarranted hardship to an applicant.” The Zoning Administrator is required to submit a written report, which is in the file.

The following specific conditions are applicable:

(1) That special conditions or circumstances exist that are peculiar to the land or structure within the County's critical area, and a literal enforcement of the critical area program would result in an unwarranted hardship. [Added by Bill 01-35]

As mentioned above and as well presented by the Applicant, the subject property was subject to a variance request and approval in 2002 which granted the Applicant relief from the hardship caused by an extensive Critical Area buffer. It was found, in fact, that the subject property was virtually useless because of the Critical Area buffer without the granting of the requested variances.

Case No. 5502 – Parcel 220, LLC

The subject property is, indeed, uniquely configured due to the existence of these extensive non-tidal wetlands and resulting buffers. As pointed out in the Staff Report, the Critical Area buffer is caused, for the most part, by the existence of non-tidal wetlands on adjacent properties. The property is further encumbered by a County sanitary sewer system. At the same time, the property is located in a highly developed, commercial area of Harford County, within the Route 40 Commercial Revitalization District. The combination of these factors leads to the clear finding that there are conditions and circumstances peculiar to this property so that a literal enforcement of the Critical Area program would result in an unwarranted hardship, being the inability to effectively utilize the subject property for any reasonable use.

- (2) *That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.*

Clearly, as stated above, the literal interpretation of the provisions of the Critical Area program would deny the Applicant any reasonable use of this property. This is not a piece of property on which the Applicant can construct a use, perhaps, limited in size and dimension because of an existing Critical Area buffer. The Applicant would be denied all use of this property by virtue of the Critical Area buffers.

- (3) *That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.*

The granting of this variance would not confer any special privilege upon the Applicant. The variance requested by the Applicant is the minimum necessary to enable a reasonable use of its property. The conditions imposed by the Hearing Examiner in the 2002 case, combined with the conditions recommended by the Harford County Department of Planning and Zoning in the instant case, will combine to insure that the intent of Critical Area legislation is met, and that the impact on water quality, wild life and plant habitation will be minimized. Neither the Department of Planning and Zoning nor the Chesapeake Bay Critical Area Commission, which have both reviewed the application, have noted any objections.

- (4) *That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.*

Most clearly, the Applicant is not responsible for any of the conditions on the site, nor has the Applicant's construction or improvement on the property contributed to its request for a variance. Indeed, the Applicant's request to create on the newly acquired portion of property a parking area, and return to its natural state a portion of the property on which it can now construct a parking lot, should have virtually no impact on water quality or water run-off in the area from the site.

Case No. 5502 – Parcel 220, LLC

- (5) *That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.*

As pointed out in the Staff Report, the net effect of the variance will be to increase by 12 square feet the impervious surface area within the buffer. However, the increase of impervious surface is located farther away from the Waters of the U.S. than that which was previously approved and is now being abandoned. The Department believes that through the application of the ten percent Pollutants Reduction Requirement of the Critical Area program there will not be a negative impact on water quality or habitat by virtue of the granting of this variance.

- (6) *That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.*

The variance request as submitted would have an impact on identified habitat protection areas onsite. These impacts must be mitigated. Specific mitigation plans must meet those requirements specified in the conditions of approval and include a 3:1 mitigation ratio for all forest impacts within the Buffer as well as a 10% Pollutant Reduction plan.

- (7) *That the growth allocation for the county will not be exceeded by the granting of the variance.*

The variance will not have any impact on the County's grown allocation.

- (8) *That the variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*

As discussed above, the variance will not be substantially detrimental to adjacent properties, nor would it materially impair the purpose of this Part 1 or the public interest. Indeed, the variance will allow a reasonable use of the property and at the same time protect the surrounding water quality and environment.

- (9) *All applications for variance requests shall be filed in writing in accordance with Section 267-9D of the Zoning Code. Notice of all variance requests and copies of applications filed in accordance with this section shall be sent to the Chesapeake Bay Critical Area Commission within 10 working days of filing with the Department of Planning and Zoning. A copy of the recommendation of the hearing examiner or of the Board in acting on the variance shall be promptly sent to the Commission."*

Case No. 5502 – Parcel 220, LLC

All provisions have been complied with. Comments from the Chesapeake Bay Critical Area Commission have been received. No objections have been made (see Attachment 12 to Staff Report).

CONCLUSION:

For the reasons stated above, it is accordingly recommended that the proposed variance be approved, subject to the following conditions:

1. The Applicants shall submit a detailed site plan to be reviewed and approved by the Department of Planning and Zoning.
2. The Applicants shall obtain all necessary permits and approvals for the improvements to be site.
3. A 10% Worksheet and associated drainage area maps must be submitted and approved prior to the issuance of any grading or use and occupancy permits. Runoff entering the site from Route 40 must be addressed as well.
4. A mitigation plan must be submitted and approved that details the reforestation necessary to comply with regulations concerning clearing the Buffer.
5. Any areas that are not to be directly utilized for vehicular sales must be established in vegetation that conforms to the requirements for Critical Area plantings.
6. This approval remains subject to all other conditions as set forth in the September 11, 2002 decision of the Harford County Hearing Examiner in Board of Appeals Case No. 5204.

Date: November 9, 2005

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on DECEMBER 12, 2005.